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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 141

SHIPPERS' CAR SUPPLY COMMITTEE,
an Oregon corporation,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Appellees,

and

SOUTHERN PACIFIC COMPANY,
Intervening Defendant-Appellee

Motion to Affirm of Intervening Defendant-Appellee Southern Pacific Company

On Appeal from the United States District Court
for the District of Oregon

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> not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full."

During the periods of the car shortage the shippers' right to receive cars was qualified by car-distribution rules originating with the carrier and binding upon the shipper under the provisions of section 1 (11), Interstate Commerce Act (49 U.S.C. § 1 (11)). The Commission concluded that the ratings assigned all shippers were constructed on the same basis and did not subject the Committee's members to prohibited discrimination.

The Interstate Commerce Act contains a recognition of the propriety of the principle of so rating shippers during periods of short car supply:

> In Pennsylvania R.R. v. Sesman Short Line Co., 242 U.S. 120, 126 (1916), this Court stated:
>
> "* * * in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen * * * car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs."

We submit that appellant's complaint of the adequacy of the Commission's report presents no substantial question meriting further argument.

The Three-Judge Court Properly Sustained the Commission

Questions involving the existence of discrimination in carriers' car-distribution rules, the adequacy of a railroad's car supply and the sufficiency of its transportation plant, are patently within the primary jurisdiction of the Interstate Commerce Commission. Rochester Tel. Corp. v. United States, 307 U.S. 125, 139 (1939); Pennsylvania R.R. v. Clark

The Appeal Presents No Substantial Question

The Commission reviewed the evidence before it, made its findings of fact, and entered its order dismissing the complaint. No substantial question is raised by what the Commission did here: no questions of first instance are involved; no statutes are to be construed for the first time by this Court. Given the Commission's findings of fact, dismissal of the complaint before it was impelled.

The basic complaint of the Committee was the inability of its members to obtain all cars desired during peak shipping seasons. The Commission concluded that the car shortages at those times were national, not peculiar to western Oregon, and that the members of the Committee were no worse off than shippers in car-shortage areas elsewhere. The postwar demand responsible for car shortages the Commission found to be unexpected, and it refused to hold Southern Pacific guilty of unreasonable laxity in meeting the demands referred to.

The rule is that carriers do not have an absolute duty to furnish cars, for, as this Court said in *Midland Valley R.R. v. Barkley*, 276 U.S. 482, 484-85 (1928):

> "* * * The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers."

To the same effect is *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1915):

> "Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right and the carrier is

The shortages in Oregon were largely the result of unprecedented expansion of the lumber industry at a time when the railroads were striving to improve transportation plants after years of depression and war. Defendant Southern Pacific far surpassed the performance of the nation's railroads on the whole in augmenting equipment and improving efficiency. Notwithstanding this, car shortages in western Oregon occurred from time to time during peak shipping months. Defendant Southern Pacific was hampered in its efforts to alleviate the western Oregon car shortage because Oregon is a deficit state, where the demand for empty cars substantially exceeds the number of loaded cars moved into the state and made empty there. To improve the Oregon supply Southern Pacific brought empty cars from junctions as far away as Texas, Louisiana and Utah, and such drawn-out supply lines were vulnerable to interruption. Its efforts were further hindered by car service orders made to balance the national freight-car pool requiring it to turn over to connecting lines at various junctions large quantities of empty cars to alleviate worse shortages elsewhere, at a time when it could not meet the demand in Oregon.

The district court, upon review, stated (160 F. Supp. at 944):

> "The Commission's conclusion that the record fails to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged.'
>
> is a logical and rational conclusion from its Findings of Fact and therefore the Commission was not arbitrary and capricious in issuing its Orders and the same are final."

quent to the charge that its facilities had received the saturation point Southern Pacific demonstrated its ability to handle an even greater volume of traffic. The Commission further noted the substantial improvements made by the company to alleviate future car-distribution problems. (pp. 330-31)

The preceding statements in the report dispose of all of the Committee's major contentions except the charge that Southern Pacific failed to distribute available empty cars equitably and to employ an adequate staff of competent employees to supervise and perform that work.

The Commission in its report states that when cars were short they were distributed by Southern Pacific according to a procedure whereby each mill received a proportionate share of the available cars in accordance with its assigned rating. The members of the Committee charged that these ratings were inequitable.

The Commission's report describes the establishment of these ratings in accordance with mill capacities. (p. 344)

The Commission refused to conclude that the rating system was discriminatory; instead the Commission concluded that, whatever the objections to it, the method was at least applied uniformly. This is clear from its conclusions respecting the Warren claim for damages. (p. 340)

The Commission's report lucidly discloses its reasoning as to the causes of the complaint before it and the responsibility for the difficulties related to it by the shippers.

A fair summary is that there were car shortages at times during the peak summer months of 1946 through 1950 and a part of 1951 in western Oregon, and that these car shortages hindered the members of the Committee and other shippers. These car shortages were regional manifestations of car shortages national in scope which occurred at approximately the same periods.

the national railroad system, it refused to hold it guilty of unreasonable laxity to meet unexpected demands.

The Commission first looked to the depression era of the 1930s and found that Southern Pacific was then oversupplied with cars. Then came World War II, in which Southern Pacific actually had a surplus of empty cars as a result of wartime freight moving to West Coast ports. From 1923 until the end of World War II Southern Pacific thus had no serious car shortages on its lines. The shortages complained of commenced in 1946. (p. 351)

The Commission reviewed what Southern Pacific had done to meet these shortages, and stated that its performance exceeded that of the railroads generally. Since the end of World War II Southern Pacific exceeded the national average in additions to equipment, ordered far more cars than the average for Class I railroads, and kept its proportion of unserviceable cars to half that of the national average. (pp. 352-53)

There is another facet to the Committee's complaint, and that is that Southern Pacific failed to expand its transportation plant (other than rolling stock) to meet the postwar demands. Various witnesses for the Committee assailed the adequacy of railroad yards at Brooklyn, Eugene and Roseburg, Oregon. The capacity of main lines over the mountains between Oakridge and Crescent Lake, Oregon, and between Ashland, Oregon, and Black Butte, California, was termed inadequate to handle the shipments originating in western Oregon. A witness for the Oregon Public Utility Commissioner expressed the opinion that traffic on the Oakridge-Crescent Lake track reached the saturation point in 1950. (pp. 341, 342)

Southern Pacific introduced evidence to refute these charges, and the Commission found it persuasive. Subse-

> "* * * (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people. * * *."

It would have been obviously impossible for Southern Pacific, regardless of the extent of its car ownership, to satisfy completely the shippers on its lines so long as the requirements of shippers on other units of the national railroad system could not reasonably be met.

The Commission believed that anticipation of future transportation needs involved prediction of future economic trends, and looked back to see whether Southern Pacific had acted reasonably in equipping itself to handle the demands which subsequently materialized. It stated that no one could have foretold with certainty the increased traffic demands which would be encountered after World War II, nor the handicaps to be experienced during the war and afterwards with governmental priorities on new equipment orders. It examined Southern Pacific's performance subsequent to the war and concluded that its record was substantially superior to that of railroads nationally. Believing that Southern Pacific had done more than its share to strengthen

The report next explains why, in times of national car shortages, the Oregon shippers experienced difficulty. The basic cause is that Oregon is a deficit area for empty cars: that is, the number of loaded cars terminating in the state is insufficient to provide empty cars for the local demand, and thus empty cars must be imported from other states. As the supply lines in shortage periods stretched out to such distant states as Louisiana — thousands of miles from Oregon — the exposure to possible interruption in the supply of empty cars increased. (p. 3560)

The freight cars which Southern Pacific and other railroads owned could not be preferentially employed to their more profitable service, as they form a national pool of cars which move freely in accordance with national demands. Thus Southern Pacific could call upon other railroads to surrender cars in their possession to help satisfy the demands in Oregon and elsewhere, and, conversely, other railroads could call upon Southern Pacific to provide them with cars to assist in meeting their requirements. The balancing of empty car supplies was supervised in the first instance by the Association of American Railroads.[2] The Commission stated that car service orders issued by the Association hampered, determent Southern Pacific at a time when it could not supply its own shippers. (pp. 3561-3562)

The Committee's position is that the post-war car shortages in Oregon could have been averted if Southern Pacific had sufficiently augmented its facilities beforehand, and that Southern Pacific should have foreseen the Oregon demand and done so. However, no one railroad can alone assure its

2 Instituted as the Association was during its car service appeal of the Commission in the Shippers of its objectives, Southern Pacific was under legal obligation to obey strictly and conform promptly to the orders under the provisions of Sec. 1 [illegible] of Part I Interstate Commerce Act. [illegible]

ARGUMENT

The Report of the Commission Provides a Rational Support for Its Findings of Ultimate Fact

The Commission's findings of ultimate fact cover two topics: first, the adequacy of Southern Pacific's transportation plant and car supply, and, second, the asserted undue discrimination against the Committee's members. As does the preceding text of the Commission's report, these findings to some extent overlap; but a sufficient distinction is preserved so that the two topics may be considered separately.

The report of the Commission, at pages 335 to 341 and 345 to 346, describes the experiences related by witnesses for the Committee who were unable to obtain sufficient empty cars for loading in the peak summer months of 1950 to 1950 and a part of 1951. While the subjective experiences of the individual witnesses demonstrate that a car shortage at times existed, they do not explain why the carrier could not comply with all of the requests for cars, nor explain the causes of the car shortages.

The Commission stated that the shortages in western Oregon should be viewed not in isolation but rather against the background of national transportation conditions at those times. The situation in Oregon was a local manifestation of a nationwide problem affecting railroads and their shippers generally, not just Southern Pacific and the Committee. (pp. 331, 333)

Although appellant indicates that these conclusions constituted conclusions of law, it is well established that they rather constitute findings of ultimate fact by the Commission. As the district court stated in footnote 5 in its opinion:

> "The courts have repeatedly pointed out that whether given rates or practices are "reasonable" or "unduly prejudicial" are factual determinations confided by Congress to the judgment and discretion of the Commission. That this must be so is manifest since the sections of the Act involved contain no definition of what is reasonable or unreasonable or what constitutes undue prejudice. We quote from or summarize a few of the decisions. In Virginian Ry. Co. v. United States, supra, 272 U.S. [658] at page 669, 47 S.Ct. [292] at page 295, [71 L.Ed. 463], it was held: "The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal informed by experience." Interstate Commerce Commission v. Martin Bros. Box Co., 9 Cir., 219 F.2d 811, at page 813."

Appellant is thus actually contending that the Commission's findings of ultimate fact are inconsistent with and are not sustained by various statements and conclusions appearing in the preceding text of the Commission's report. Therefore, the question on appeal should be restated as follows:

> "Does the report of the Commission indicate that the Commission was acting arbitrarily or capriciously, i.e., does the report of the Commission provide a rational support for its findings of ultimate fact?"

Although appellant in the district court contended that the record before the Commission did not contain substantial evidence to support the Commission's findings of fact, its statement of Questions Presented indicates it is advancing no such contention in this appeal. Indeed, appellant's Statement of Jurisdiction specifically disclaims doing so:

Wren filed a petition in the district court for the district of Oregon, seeking *review* of the Commission's order.

The district court recognized that *two* separate and distinct forms of relief *were* sought by the petitioners. *Wren* sought damages for alleged violations of law in the past, *while* the Committee sought relief for the future. The *Wren* claim *was* personal, *whereas* that of the Committee *was* in the nature of a class action seeking relief legislative in effect for the future.

A three-judge court *was* convened under the provisions of 28 U.S.C. §§ 1336, 1398, 2321-2325 and 2284, and 49 U.S.C. § 17(9). That court recognized that it should not, as a three-judge court, concern itself *with* a *review* of that portion of the Commission's findings and order dismissing *Wren's* claim for damages. *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 443 (1949). The three-judge court thereupon severed the *Wren* claim and referred it to a single judge for hearing, *where* it is *now* pending in the district court.

The issues *reviewed* by the three-judge court concern only future relief and not damages for past transactions. The Committee's appeal to this Court is so limited.

Question Presented on Appeal

The "Questions Presented", as stated by appellant in its Statement of Jurisdiction, are *whether* the report and order of the Commission contain findings to sustain its follow*ing* conclusions:

> "The record fails to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service *within* the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged."

meeting carriers at Portland, Salem, Albany and Eugene, Oregon.

When sought an award of damages of $134,385.50 for alleged failure to furnish it with sufficient cars.

Southern Pacific denied the allegations of the Committee and its supporting intervenors and asserted as an affirmative defense that the car shortages referred to were but local manifestations of contemporaneous national shortages which resulted from a number of causes, for none of which it could or should be held liable. It further asserted that it had done, and would continue to do, all within its power, circumscribed only by financial limitations, availability of materials, and production capacity of suppliers, to acquire and maintain an expanded car supply and locomotives to move them and to provide a railroad system reasonably adequate to meet the needs of its public.

A hearing was held before an examiner of the Commission for four days in December of 1951 at Portland. Three additional days of hearing were held in September 1952.

The examiner issued a proposed report, and exceptions and replies thereto were filed by the parties. Oral argument was held before the Commission at Washington, D. C., and it thereafter issued its report and order: 292 I.C.C. 537 (Appendix). The unanimous report of the Commission, Division 3, concludes "that the record fails to establish that the defendant [Southern Pacific] failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of complainant's members to undue or unreasonable prejudice or disadvantage." (p. 553) The Commission dismissed the complaint.

In January 1956, some fifteen months after the denial by the Commission of reconsideration, the Committee and

and did so seek damages. /s shall be explained in connection with the proceedings before the district court, that claim is not before this Court now.

The allegations of the complaint constituted, in summation, an accusation that Southern Pacific had been derelict in its duty to serve Oregon lumber shippers. The gravity of this implication prompted the Public Utility Commissioner of Oregon to intervene on behalf of the Committee, with the result that what had been instituted as a complaint proceeding between private litigants developed into virtually a general investigation.

The Committee and the Public Utility Commissioner sought an order directing Southern Pacific to cease and desist from unlawful acts or practices in respect to car supply and distribution and the adequacy of its facilities. They asked the Commission to require Southern Pacific, in furtherance of the general objective of such an order, to—

acquire additional freight cars;

install a centralized traffic control system on its line between Oakridge and Crescent Lake, Oregon;

extend the length of sidings between Oakridge and Crescent Lake, Oregon;

adopt uniform rules to govern car distribution practices;

acquire an adequate staff for the equitable application of car distribution rules;

build additional interchange tracks at Portland, Oregon; and

make additional interchange arrangements with con-

1 A technical term for an electronic system of directing the movements of trains from a single central *switchboard* instead of by operating timetables or instructions from the train dispatcher relayed by station operators to train crews.

(Commerce (Commission inveking sections 1(4), 1(11), and 3(1) of the Interstate (Commerce Act (49 U.S.C. §§ 1(4), 1(11) and 3(1), respectively), alleging that Southern Pacific had failed to provide transportation upon reasonable request; had failed to furnish adequate car service; had caused undue and unreasonable prejudice and disadvantage to the individual members of the Committee by failure to provide the same proportion of car service requirements to them as was furnished other shippers in Oregon and elsewhere; and had caused undue and unreasonable prejudice and disadvantage to Oregon shippers generally while giving undue and unreasonable preference and advantage to shippers in other states; and that these acts had caused the Committee's members lost sales, lost goodwill and lost profits, for which Southern Pacific should be held liable.

The gravamen of the complaint to the Commission lay in the railroad car shortages which existed from time to time during peak shipping months subsequent to World War II and until the filing of the complaint in 1950. The Committee, principally comprised of certain shippers of lumber or forest products, alleged that these car shortages, in Oregon, resulted from unlawful acts of Southern Pacific and sought this from the Commission: first, that Southern Pacific be held responsible in damages to the Committee's members and, second, that Southern Pacific be ordered to cease and desist in the future from the conduct of unlawful practices in respect to car service, car supply, and transportation facilities.

The prayer for damages was made for the benefit of any member of the Committee who might be prepared to present evidence and seek a finding for his individual benefit. One of its 93 members, the partnership of A. L. Mechanis and Cosima D. Mechanis, doing business as Tron Planing Mill (which shall be referred to as Tron), intervened separately

STATEMENT

The Parties

Appellant, Shippers' Car Supply Committee, will hereafter be referred to as the Committee, appellee Interstate Commerce Commission as the Commission, and intervening defendant-appellee, Southern Pacific Company, as Southern Pacific. Southern Pacific is the defendant in the proceeding before the Commission and exercised its right under 28 U.S.C. § 2323 to intervene as a party defendant in the district court, from whose decision this appeal is taken. Other parties who appeared before the Commission but are not involved in this appeal are the Public Utility Commissioner of Oregon and Cosima D. Medonis and A. L. Medonis, doing business as Iron Planing Mill, intervenors on behalf of complainant Committee. The Commissioner did not appear in, and Iron Planing Mill's claim is still pending before, the district court.

Prior Decisions

The opinion of the district court is reported in Shippers' Car Supply Committee v. Interstate Commerce Comm'n, 160 F. Supp. 930, and is also set forth as an appendix to appellant's Statement of Jurisdiction. The report of the Commission is reported sub nom. Shippers Car Supply Committee v. Southern Pacific Co., 292 I.C.C. 337 (1954), and is set forth as an appendix to this motion. References herein to pages of that opinion are to the pagination of the official reports, which is retained in the appendix.

Facts

Southern Pacific is a railroad engaged in interstate commerce, serving, among others, the state of Oregon.

On November 6, 1950, Shippers' Car Supply Committee, an Oregon corporation, filed a complaint with the Interstate

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October Term 1955

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Motion to Affirm
of
Intervening Defendant-Appellee
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On Appeal from the United States District Court
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Comes Now Southern Pacific Company, a corporation, intervening defendant-appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, and moves that the final judgment and decree of the District Court for the District of Oregon be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

Coal Co., 238 U.S. 456, 469 (1915); *Louisville & N. R.R. v. Corp.*, 54 F.2d 8, 10 (6th Cir. 1931).

Review of orders of the Commission has, over the years, been subject to certain very definite limitations. In *Interstate Commerce Comm'n v. Mechling*, 330 U.S. 567, 574 (1947), this Court said:

> "Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited."

There is first a presumption of validity of the Commission's orders.

Federal Power Comm'n v. Hope Gas Co., 320 U.S. 591, 602 (1944);

Interstate Commerce Comm'n v. Jersey City, 322 U.S. 503 (1944);

Rochester Tel. Corp. v. United States, *supra*, 307 U.S. at 145-46.

The judicial function of the Court is exhausted when there is found to be a rational basis for the Commission's conclusions.

United States v. United States Smelting, R. & M. Co., 339 U.S. 186, 193-94 (1950);

Swift & Co. v. United States, 343 U.S. 373, 382 (1952);

Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 593 (1949);

Interstate Commerce Comm'n v. Jersey City, *supra*, 322 U.S. at 522-23;

Swift & Co. v. United States, 316 U.S. 216, 230-31 (1942);

Rochester Tel. Corp. v. United States, *supra*, 307 U.S. at 146.

Next is the doctrine of administrative finality, succinctly stated by this Court in *Rochester Tel. Corp. v. United States, supra*, 307 U. S. at 139-40:

> "* * * The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n v. Illinois Central R. Co.*, 215 U.S. 452, 470; *Interstate Commerce Comm'n v. Union Pacific R. Co.*, 222 U.S. 541."

This doctrine has been specifically applied to decisions of the Interstate Commerce Commission respecting car supply and distribution. *St. Louis, etc., Ry. v. Brownsville Dist.*, 304 U.S. 295, 301; *Pennsylvania R.R. v. Puritan Coal Mining Co., supra*, 237 U.S. 121, 134; *Midland Valley R.R. v. Excelsior Coal Co.*, 86 F.2d 177, 181 (8th Cir. 1936); *Martin Bros. Box Co. v. Interstate Commerce Comm'n*, 219 F.2d 811 (9th Cir. 1955), *cert. denied*, 350 U.S. 823.

The three-judge court therefore properly viewed its duty and powers in these terms:

> "Our inquiry and office is not to weigh the evidence nor question the soundness of the reasoning 'of a tribunal (Commission) appointed by law and informed by experience,' but to determine if the Commission's Findings and Order lay within its statutory power and are supported by substantial evidence in the record as a whole and free from arbitrary and capricious action." (160 F.Supp. at 943)

That court, in the exercise of its function, stated:

> "While in some phases the evidence offered by the parties before the examiner is contradictory from the

documentations in the briefs of the parties and from the record as a whole, suffice, to say, the record reveals that the Commission's Findings of Fact are supported by substantial evidence and that its conclusions are rational." (160 F.Supp. at 944)

"* * * The Commission's conclusion that the record fails

'—to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged.'

is a logical and rational conclusion from its Findings of Fact and therefore the Commission was not arbitrary and capricious in issuing its Orders and the same are final." (160 F.Supp. at 944)

The cause before the three-judge court, as before this Court, involves only relief for the future.

The court concluded that the controversy before it was moot (160 F.Supp. at 943). This, too, is a reasonable conclusion. The Committee sought, it will be recalled, revised rules for the distribution of cars, and that Southern Pacific be compelled to install a centralized traffic control system on one of its main lines, expand its passing tracks, and increase the capacity of its yards.

The record before the Commission was closed in September, 1952. At that time it portrayed a picture of dynamic progress in the improvement and expansion of Southern Pacific's plant in Oregon. At oral argument in February, 1954, the Commission was advised that, respecting the centralized traffic control system, "Installation of such control between Eugene and Crescent Lake was in progress" (292 I.C.C. at 550).

Moreover, the Oregon Commissioner made an order on June 27, 1953, which was adopted by Southern Pacific for interstate traffic. It provides that:

> "car ratings for shippers of lumber shall be based on prior loading performance of each shipper, determined from a fair average of the highest loadings in 3 months of each of the 2 preceding calendar years, giving due consideration to new or changed facilities and present or anticipated shipments by water or motor carrier." (p. 545)

The Commission clearly believed that future car service would be improved by the enlarged facilities of Southern Pacific and the expanded car fleet of the nation's railroads. The railroad's car distribution rules, too, had been superseded by similar rules proposed by the Public Utility Commissioner of Oregon.

> "With respect to the present facilities and service of the defendant, the additional cars and diesels purchased, the improved facilities, and the increased operating efficiency in recent years, together with improved car distribution which should result from compliance with the order of the Oregon commissioner, effective June 27, 1953, may reasonably be expected to insure adequate car supply and service, and equitable car distribution, to the complainant's members in the future." (p. 553)

In the event the future were not as satisfactory as anticipated, the Commission invited the Committee to return:

> "* * * should inequitable car distribution develop * * * application should be made promptly to the Commission for relief, when consideration will be given to the issuance of a car service order requiring the defendant to distribute the available cars in an equitable manner." (p. 553)

The relief which the Commission offered the Committee would be of immediate help if the Committee should feel that Southern Pacific were unlawfully discriminating in the distribution of empty cars. The car service order is an extraordinary power of the Commission, which may be exercised "at once, without answer or other formal pleading by the interested carrier, * * * and without notice, hearing or * * * report" whenever the Commission "is of opinion that shortage of equipment, * * * or other emergency requiring immediate action exists in any section of the country". The Commission may then "make such just and reasonable directions with respect to car service * * * as in its opinion will best promote the service in the interest of the public." (49 U.S.C. § 1(15))

The Commission believed that the facts comprising the background of the Committee's complaint had so changed that affirmative orders respecting the future were not warranted. This belief, incidentally, gained some confirmation from the complaining shippers; there was evidence that the shortages were easing by 1951.

> "One of the partners, a principal witness for Wren, testified that the car-supply situation in 1951 for Wren was 'very good'." (p. 548)

If the Committee should subsequently believe that Southern Pacific was unlawfully discriminating against its members by inequitably distributing cars, then, said the Commission, the extraordinary and immediate remedy of a car service order would be available.

It was the evident view of the district court that the lapse of time from September 1952 to January 1958 (which included a delay from October 1954, when reconsideration was denied by the Commission, to January 1956, before the Committee filed its petition in the district court), in view of a

1952 record which showed the background facts to be in a dynamic state of flux, was sufficient to render the plea for future relief moot. This is a sensible and logical conclusion, for, even if the court had been inclined to strike down the decision of the Commission, the court could only have remanded the cause to the Commission. The three-judge court could not, after reviewing the record, direct the Commission to enter certain findings, nor could the court itself make findings and prescribe appropriate measures of relief for the future.

> *Eastern-Central Ass'n v. United States*, 321 U.S. 194, 212 (1944);
>
> *United States v. Jones*, 336 U.S. 641, 672-73 (1949).

If once placed in the Commission's hands again, it would be inconceivable that that body would make findings and issue orders respecting future conduct without holding hearings to determine what the facts are today—especially if Southern Pacific offered to prove, as it would, that substantially all of what was sought by the 1950 complaint has, in the course of progress over the intervening years, been accomplished.

The district court's ruling that the controversy before it had become moot and should be dismissed was, it seems to us, a ruling upon a matter in abatement:

> "Abatement at law is the overthrow or destruction of a pending action apart from the cause of action."
>
> *Bowles v. Wilke*, 175 F.2d 35, 37-38 (7th Cir. 1949), *cert. denied*, 338 U.S. 861, quoting 1 C.J.S., *Abatement and Revival*, § 1

The court's ruling would terminate the suit before it without reference to the merits of the controversy; such a ruling

in the district court upon matters in abatement is not reviewable on appeal.

28 U.S.C. § 2105;
Bowles v. Wilke, supra, 175 F.2d at 37.

While we do not imply that the Committee's appeal is frivolous, we do point out that its quest for future relief upon an aging record is undoubtedly the most roundabout possible approach. We say this because the Commission, in its report, invited the Committee to return for a car service order (which could be issued without notice or hearing) if the future car-supply situation did not meet expectations. The Committee could also at any time file a new complaint with the Commission, or possibly reopen this docket, seeking an order appropriate to today's facts rather than those of 1946-1952. While not as expeditious as a car service order, such procedures would be substantially more expeditious than a subsequent remand of this cause to the Commission, with consequent further hearings. We thus believe argument in this Court on the issue of future relief is neither warranted nor appropriate, so long as the doors of the tribunal of first instance remain open to the Committee, as they do.

CONCLUSION

We respectfully submit that appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Dated at San Francisco, Calif., this 25th day of July, 1958.

Respectfully submitted,

CHARLES W. BURKETT, JR.

Attorney for Intervening Defendant-Appellee Southern Pacific Company

JAMES E. LYONS
JOHN MACDONALD SMITH
GEORGE B. CAMPBELL

Of Counsel

Proof of Service

I, Charles W. Burkett, Jr., one of the attorneys for Southern Pacific Company, intervening defendant-appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 25th day of July, 1958, I served copies of the foregoing Motion to Affirm on the several parties herein as follows:

1. On the United States, by mailing a copy in a duly-addressed envelope with airmail postage prepaid to C. E. Luckey, Esq., United States Attorney for Oregon, at the United States Court House, Portland, Oregon; and by mailing a copy in a duly-addressed envelope with airmail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly-addressed envelope with airmail postage prepaid to Robert W. Ginnane, its Chief Counsel, at the offices of the Commission, 12th Street and Constitution Avenue, Washington 25, D. C.

3. On Shippers' Car Supply Committee, appellant, by mailing a copy in a duly-addressed envelope with airmail postage prepaid to its attorneys of record, William P. Ellis, Esq., and Dean Ellis, Esq., at their office at 1102 Equitable Building, Portland 4, Oregon.

CHARLES W. BURKETT, JR.

(Appendix follows)

Appendix

Interstate Commerce Commission

No. 30708

Shippers Car Supply Committee[1]

v.

Southern Pacific Company

Submitted February 11, 1954. Decided May 26, 1954

Defendant not shown to have failed to provide transportation of property upon reasonable request therefor, or to have failed to furnish adequate car service within the limits of its capacity, or to have subjected complainant's members in western Oregon to undue or unreasonable prejudice or disadvantage. Complaint dismissed.

William P. Ellis and *Dean Ellis* for complainant and certain interveners.

Clifford W. Ferguson, Thomas W. Deuch, Robert R. Clark, and *Donald A. Haakenson* for Public Utilities Commissioner of Oregon, intervener.

James E. Lyons, Charles W. Burkett, Jr., James C. Dezendorf, and *Stanfield B. Johnson* for defendant.

REPORT OF THE COMMISSION

Division 2, Commissioners ALLDREDGE, ARPAIA, and FREAS

By Division 2:

Exceptions to the report proposed by the examiner, and replies thereto, were filed by the parties. We have heard the parties in oral argument. Exceptions and requested findings

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[1]Complainant is a nonprofit corporation of Oregon dedicated to the purpose of improving the freight car supply and the quality of railroad service, especially in western Oregon.

not discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on November 6, 1950, the complainant charges the defendant with the following specific violations of law:

1. Failure to provide transportation of property upon reasonable request, particularly in failing to provide adequate trackage, motive power, and other facilities and equipment to meet the demands of the shipping public, in violation of section 1(4) of the Interstate Commerce Act.

2. Failure to furnish adequate car service, particularly (*a*) in failing and neglecting to purchase or construct a supply of cars adequate for the needs of its shippers; (*b*) failing to effect suitable arrangements with connecting carriers for interchange of empty and loaded cars; and (*c*) failing to employ an adequate staff of competent employees to promptly, efficiently, and fairly distribute the supply of cars available, in violation of section 1(11) of the act.

3. Causing undue and unreasonable prejudice and disadvantage to complainant's members by failure to provide car service to them in the same [537] proportion to actual requirements as were provided to other shippers on its lines in Oregon and elsewhere, contrary to section 3(1) of the act.

4. Causing undue and unreasonable prejudice and disadvantage to shippers generally on its lines in Oregon and giving undue and unreasonable preference and advantage to other shippers on its lines in other States, in violation of section 3(1) of the act.

5. Causing substantial increases in transportation and marketing costs, substantial losses in labor, production, and profits of complainant's members and others, by curtailing their production by preventing them from making deliveries on contracts and from selling their products in the open market, which has re-

sulted in damage and loss of goodwill for which the defendant is liable.

The complainant seeks an order directing the defendant to cease and desist from the unlawful acts alleged, and requiring it to provide the complainant's members and other shippers on the defendant's lines in western Oregon with adequate and nondiscriminatory service and facilities, and to pay to the complainant's members such damages as may be claimed and established by them, with reasonable counsel fees.

The Commissioner of Public Utilities of Oregon intervened generally in support of the complainant. A. L. MacInnis and Cosima D. MacInnis, doing business as Wren Planing Mill, intervened in support of the complainant and, in addition to a prayer for general relief, seek an award of damages.

The defendant answered, challenging the sufficiency of the complaint and alleging that there is a defect of parties defendant in that connecting lines are necessary parties with respect to the matters alleged. Concurrently with the filing of its answer, the defendant made a motion to dismiss the complaint and, alternatively, to make the same more definite and certain. This motion was overruled on February 8, 1951, but without prejudice to the defendant's requesting, at the close of the complainant's testimony, a further hearing for the introduction of evidence respecting those allegations of the complaint which the defendant claimed are indefinite and uncertain. Such a further hearing was held.

The chairman of the complainant committee has been engaged in the wholesale lumber business as the Trio Lumber Company at Eugene, Oreg., for more than 25 years. He owns an interest in the Douglas Manufacturing Company, a saw-

mill and remanufacturing plant near Roseburg, Oreg., with an output of 90,000 feet per day, and in the Ada Company, of Ada, Oreg., producing 25,000 to 30,000 feet per day. The market for his lumber generally, and that of other shippers who testified of record, is practically throughout the United States. The practice of billing is not uniform. Sometimes the company is shown as the shipper, sometimes the mill, and in some instances the purchaser of the lumber is named as the shipper. The inability to obtain cars when desired caused the chairman of the complainant in 1946 **[538]** to investigate the causes for the lack of cars for Oregon lumber shippers. He contacted the western representative of the Association of American Railroads in Seattle, Wash., and described the situation, but without results. Thereafter, following the car shortage of 1947, he and two other firms, by letters, requested an investigation by the Commission of the lack of car service to western Oregon lumber shippers, but apparently no relief was obtained. In 1948, he was appointed chairman of a traffic committee for the Western Forest Industries Association. The purpose of the association was to make an investigation among shippers with a view to remedying the situation caused by the car shortage. During the investigation, it was determined that an organization devoted solely to investigating the car supply should be formed, and the complainant committee was created for the purpose.

The car shortage at Eugene was serious during the summer months of 1946 and for subsequent summer seasons, including 1950 and some of 1951. During these months of heavy demand, a customer could not be advised when a shipment would be made because of the lack of cars. This condition affected western Oregon lumber shippers, particularly those located on the lines of the defendant, to such an extent

that they lost the so-called "premium business," that is, business commanding premium prices for quick shipments. The inability to get cars when needed caused the mills to take orders for short periods instead of a normal 30-day order supply. The car shortages of 1946 and 1947 caused purchasers to operate in much the same manner. This eventually led to the practice of the so-called transit sales. Although not satisfactory either to the producer or the buyer of the lumber, 50 percent or more of the volume shipped from western Oregon was forced into this practice because of inability to arrange for the shipment of a carload when needed.

In 1950 the chairman of the committee went into the State of Washington to obtain cars to be stopped off for completion of loading in Oregon. This caused extra expense and delay. Shippers could obtain cars from railroads in Washington, put a small amount of lumber therein, and route them through Oregon to complete loading. The routing of such cars generally was "UP-SP-UP." For a time no definite amount of lumber had to be loaded to obtain the use of a car. Later, 25 percent of the carload minimum weight was required. That requirement was hard to meet because of the difficulty and cost of obtaining the quantity and quality of lumber desired. This caused the wasteful use of cars and afforded slight relief. In some instances lumber was hauled by truck as much as 200 miles from origins (local to the defendant) to Portland, Oreg., for partial loading, and some cars were fully loaded from the trucks in Portland. **[539]**

The failure to get cars when needed caused many mills to shut down during the summer months of 1946-50. The situation was particularly bad in 1949 and 1950. When the lumber could not be shipped substantially as produced, storage costs became prohibitive. Shipping members of the com-

plainant at Grants Pass, Oreg. (local to the defendant), experienced severe car shortages during the summer of 1947-50. One of the complainant's members operates a custom milling business and molding plant at Grants Pass with a daily capacity of 8 cars. During the car-shortage periods of 1949-50, he received as low as 1 car or 2 cars per day. The mill had storage for some 5,000,000 feet of lumber, but when that much lumber accrued the plant had to stop work, thus causing a shutdown of all supplying mills. Handling and storing large quantities of lumber resulted in extraordinary inconvenience and expense, and the cost of such operations could not be added to the price of the lumber or millwork. Shippers generally, and particularly those at Grants Pass, complained of poor service, such as switching, time changes in switching, and the manner of handling orders for cars. Some 15 other witnesses representing lumber shippers who operated from 1 mill to 5 mills and produced large quantities of lumber for shipment by rail, most of whom were dependent for cars upon the defendant, testified to the same effect.

Witnesses for feed and seed dealers in Oregon, located on the defendant's lines at such points as Cornelius, Gladstone, and Roy, described as serious to them the car shortages of 1946 and 1947. Their greatest losses caused by lack of cars were during the summer months of those years. Some of their plants are located also on the lines of the Spokane, Portland and Seattle Railway Company, and some on the lines of both the defendant and the Oregon Electric Railway Company. At most of the times they were able to obtain cars as needed at the competitive points. The bad effects of the 1950 car shortage was reduced by trucking their grain to Portland. The 1951 crop was about 10 percent of the normal volume, so that little of it was offered for shipment in that year.

Witnesses for lumber interests of Grants Pass testified at the adjourned hearing as to conditions existing during the summer months of 1952. Operations of the Engler-Hudson Company located some four city blocks from the defendant's station, were described. This company operated 2 shifts daily and produced some 250,000 feet per day. The capacity of the plant was rated as 8 cars per day. On 6 of the first 10 business days of July, orders were not filled, although presumably there was no car shortage elsewhere on the defendant's line at that time. On July 11, six cars were furnished. A shortage of cars was experienced every other working day in July (1952), except 2. The record for the month was 113 cars ordered and 82 **[540]** furnished, a shortage of 31. For August, on 7 working days, the company received no cars, but had orders for an average of 8 for each day. The record for August was 184 cars ordered and 83 furnished, a shortage of 101. On and between September 1 and 19, 1952, 72 cars were ordered and 56 were furnished.

The complainant employed a special representative with some 30 years' experience in traffic matters in this origin territory. He visited practically all communities in the territory, attended many meetings looking to the improvement of car supply, and worked closely with members of the complainant and lumber shippers in western Oregon during the car shortage of 1950. He found a large quantity of lumber being loaded from trucks into cars at Portland during the summer of 1950, which had been trucked from points local to the defendant's lines, some of them as far distant as Coos Bay, Oreg. Apparently the cars were furnished by carriers other than the defendant, although some were loaded from trucks at Park Street and at East Portland on tracks operated by the defendant and the Union Pacific Railroad Company.

It is urged by the complainant that the trackage and other facilities of the defendant are not adequate to meet the transportation needs of the area in western Oregon served only by its lines. It charges the defendant's management with failure to recognize important changes that have occurred in the lumber industry. During the last 15 to 20 years, the transition of the industry from western Washington to western Oregon has been marked, especially in recent years. Lumber shipments from Oregon originating on the lines of the defendant have increased by some 92,000 carloads, 1950 over 1938, or by 65.92 percent. In 1925, Washington produced almost twice as much lumber as that produced in Oregon; today the reverse is true.

Witnesses expert in the lumber business in Oregon expressed the opinion that production will continue to increase for many more years; that the yard tracks at Eugene are sometimes "jammed;" and that Roseburg is short of adequate storage tracks. It is practically conceded that the Brooklyn yard facilities at Portland have been so taxed at times as to cause serious delays. The complainant emphasizes that carrier facilities designed for conditions of 1930 do not meet the needs of the Oregon Lumber industry as it exists today.

This proceeding, although instituted by complaint, developed into a general investigation. Considerable evidence of record was obtained by employees of the Commissioner of Public Utilities of Oregon, intervener. These employee witnesses cooperated with the complainant and its counsel. It was not possible for the personnel of the intervener to survey traffic conditions on all lines of the defendant in Oregon, but efforts were concentrated on certain portions which seemed to con- **[541]** stitute "bottlenecks." The Oakridge-

Crescent Lake portion was characterized as "the cork in the bottle," and as having reached a saturation point in 1950.

Train sheets were checked for records of performance at Eugene, Portland, and Albany, Oreg. The testimony related principally to the operation of trains between Eugene and Crescent Lake and between Ashland, Oreg., and Black Butte, Calif. Operation over the mountains is considered a factor materially affecting the ability of the defendant to get empty cars into western Oregon, sometimes referred to as the valley, and loaded cars out. From his studies a witness for the intervener concluded that there is more traffic available on the defendant's lines in western Oregon than it is feasible to handle in existing operations over the Oakridge-Crescent Lake tracks. He strongly urged the use of the Portland gateway, and expressed the opinion that relief could come from an order by this Commission requiring the Oregon Electric and the defendant to interchange cars at such points as Albany or Eugene for loading at points as far south as Drain, Oreg., at the one-factor joint rates applicable over other routes. The record indicates, however, that the defendant could handle more traffic between Eugene and Portland, and the one-factor joint rates to the East are now applicable over that line via Portland. The witness suggested also that lumber shippers would be benefited, and the handling of Oregon lumber traffic could be facilitated, by enlarging the defendant's yards at Eugene, and by installing central traffic control and lengthening the passing tracks on the Eugene-Crescent Lake line.

In a number of instances cars furnished Oregon lumber shippers were undesirable for intended shipments. One shipper was given 44 undesirable cars out of 98 furnished in the month of July 1950; another was compelled to load cattle, refrigerator, and gondola cars; another had to accept cars

littered with debris from previous shipments; and others were furnished automobile cars limited to California destinations where the market was not always desirable.

The total number of carloads originated by the defendant in 1950 exceeded the number originated in 1940 by 327,000, an increase of 36.5 percent. During this period the number of cars owned by the defendant increased by 15,389, an increase of 41.2 percent, as compared with an increase of 4.7 percent for all class I railroads in the country. It is claimed, however, that this does not portray adequately the car-supply situation as it affects Oregon lumber. The defendant is said to have depended for many years for its car supply upon cars furnished by other lines. At numerous times during earlier years the number of cars on the defendant's line has been between 180 and 194 percent of the number owned by it, whereas in **[542]** more recent years, 1949 for example, the average was only 128 percent. The general superintendent of transportation of the defendant testified that the general adoption of the 5-day week has decreased the utility of freight cars to such an extent that it has displaced an estimated 5,197 of defendant's car supply. Using that figure, instead of an increase of 41 percent in car ownership in the last 10 years, the effective increase was only 27 percent. Another influence upon the defendant's car supply is the fact that the average length of haul of lumber products originating in Oregon has increased from 1,293 miles in 1940 to 1,598 miles in 1949 and 1,718 miles in 1951.

The use by the defendant of its 1940 ownership as a base of comparison is criticized because the ownership in that year is said to have been the lowest for a long period of years, having been only 85 percent of the 1937 ownership. This is largely the reason, according to the complainant, that during the war years 1941-45 the defendant had little

more than half enough cars to meet its traffic requirements. The complainant insists that the defendant was short some 19,000 cars in 1940. Attention is called to the defendant's evidence that the number of cars owned or leased in 1951 was 147.7 percent of that in 1940, and that with the improvement made in car equipment it could, in 1951, transport 155.6 percent of the 1940 tonnage. In the same period carloads of revenue freight originated increased 143 percent, and the number of tons increased 158 percent. The lumber and grain shippers here complaining, however, are interested principally in boxcars. The increase 1951 over 1940 in that class of equipment was 145.1 percent in number and 146.6 percent in carrying capacity. Forest products (excluding logs) originated by the defendant in Oregon during that period increased 183 percent in carloads and 209 percent in tons. It is claimed that some 7,700 more boxcars than were acquired by the defendant were needed for the increase in this traffic, and that 12,000 additional boxcars would have been required to keep pace with the 204-percent increase in the production of Douglas fir lumber in Oregon during the same period. This apparently assumes that the defendant would have transported all of this traffic, whereas some of it moved by water and some by motor carrier.

In 1950, some 82.5 percent of the defendant's traffic originated in Oregon consisted of forest products. Comparisons were made of revenue ton-miles and traffic originated per mile of road on lines of the defendant with national averages. On the revenue ton-mile showing, the complainant claims that the defendant was short in car ownership by several thousand cars. As to traffic originated per mile of line, the national average in 1950 was 145 cars in contrast with 150 for the defendant's system lines, and 215 on its Oregon lines. [543]

Shortage in adequate car ownership by the defendant, under fair and equitable distribution, would affect its ability to serve shippers over its entire system. A witness for the Oregon commissioner testified that the car shortage on the Portland division was acute from the week ended May 15 until the second week of November 1950. Weekly shortages after that first week exceeded 1,000 cars, averaging 2,864 cars during July, and reaching a high of 5,562 in late August. Somewhat comparable figures were presented by the general superintendent of transportation for the defendant. They show that an average shortage of some 1,352 cars existed on the Portland division. These data indicate that a severe shortage of cars was experienced on the Portland division some weeks before any shortage was indicated for the rest of the system. No overall system shortage is shown until the week ended June 17, 1950. The system shortage for that week appears as 831 cars, whereas the shortage for the Portland division is given as 1,497 cars. According to the complainant, the weekly average shortage on the Portland division was from two to three times that shown for the system. For example, for the weeks ended July 15, 22, and 29 a net system surplus of 303,421, and 95 cars appears, whereas the complainant indicates there was a shortage on the Portland division of 2,091, 2,793, and 2,884 cars, respectively.

The complainant asserts that the inadequate car supply was so distributed as to discriminate unjustly against the lumber shippers of western Oregon. An important factor in this respect is said to be the manner in which the cars available were allotted to the several western Oregon mills. Mills were given ratings by an official of the defendant at Portland. The so-called agents' 50 report was placed in use on the Portland division at the beginning of the car short-

age in 1950. At first it was compiled from information supplied by the defendant's agents. The official who prepared the agents' 50 report was subpenaed by the complainant. His testimony indicates that some of the mills were rated according to their cutting capacity, using 30,000 feet as a carload, and others were rated on their ability to load a given number of cars in an 8-hour period. The only reason he could give for this variance was that the information was furnished by the agents, and that some mills apparently were loading lumber which they did not cut. In 1951 the report was compiled on the basis of information furnished directly from the millowners. Changes in the agent's reports were made at various times as errors were discovered or as new information was received. The Oregon commissioner issued an order, effective on September 25, 1950, requiring the defendant to keep and preserve uniform records of all orders for cars, the orders to be written or confirmed in writing. That order was superseded by another which became effective on September 4, 1952. **[544]** and the latter was superseded by another, effective on June 27, 1953. The last order provides that car ratings for shippers of lumber shall be based on prior loading performance of each shipper, determined from a fair average of the highest loadings in 3 months of each of the 2 preceding calendar years, giving due consideration to new or changed facilities and present or anticipated shipments by water or motor carrier.

The complainant charges the defendant with unlawful acts in connection with car service, or the lack of it, in western Oregon which caused lumber shippers to suffer increases in transportation and marketing costs from curtailment in production that prevented deliveries on sale contracts for lumber and on sales in the open market, all

resulting in damage and loss of goodwill, for which the complainant alleges the defendant is liable. These allegations were made in the complaint for the benefit of any lumber shipper, member of the complainant committee, who might desire redress through an award of reparation. Only one, the partnership doing business as Wren Planing Mill, has asked reparation in this proceeding. Violation of sections 1 (4), 1 (11), and 3 (1) are specifically alleged by this complaint, and damages under sections 8 and 9 of the act are sought for the period June 1 to October 1, 1950. It is charged that during that period the defendant failed to furnish this shipper a reasonable car supply, and that it unlawfully discriminated against this shipper in that it failed to make an equitable distribution of the cars available on the Portland division. This claim is based principally on the alleged failure of the defendant to establish and enforce an equitable car distribution rule during this period of car shortage, said to be due largely to inconsistencies and variances in keeping records of cars ordered and supplied to this and other shippers.

Most Oregon lumber mills, including Wren, are dependent upon the defendant for an adequate car supply to keep their mills in operation. Storage facilities are limited. Without cars the storage space soon is filled and slowdown or shutdown in operation is forced. The claim is that the defendant, by failure to supply cars, prevented Wren from producing lumber which otherwise it could have produced and sold. Wren testified that there was no stoppage of work at its mill during the period June 1 to October 1, 1950, except for that made necessary by lack of cars. There was no recorded sawmill production for a period of 10 days from August 18 to August 29, 1950. However, during that time the defendant furnished Wren two cars, one on August 23 and one on

August 24. On August 14 Wren ordered 6 cars for placement on August 18; on August 19 6 cars were ordered for placement on August 21; and on August 24, 18 cars were ordered, 6 for each day of August 25, 26, and 28. This total of 30 cars ordered [545] for delivery during the 10-day period shows, according to the complainant, that the shutdown was due solely to the lack of cars.

Reference is made to reports of the Commission in which it has discussed methods for distribution of cars in periods of car shortages. In *Tanner & Co. v. Chicago, B. & Q. R. Co.*, 53 I. C. C. 401, 406, it is said:

> Thus, it is a common practice of carriers in periods of car shortage to distribute coal cars in accordance with mine ratings, determined by the volume of past shipments; but coal is shipped as mined and the amount that may be considered ready for shipment is the amount that can be mined, loaded, and forwarded from day to day. The best evidence of mine capacity is the volume of shipments during normal periods. * * *

Lumber produced at mills in western Oregon must be shipped largely as it is produced. The complainant stresses the fact that rating such a mill for cars based on production, as indicated in the quotation above, is not a proper measure because car shortages have existed in western Oregon during summer months since 1946, and ratings based on prior production would necessarily carry into effect the consequences of prior car shortages and serve to protect the defendant in its failure to furnish cars in subsequent periods of car shortage. Because of this, the complainant asserts that there has not been a period of normal movement of lumber from this origin territory that would show the true capacity of the lumber mills or the true market demand. It is argued, therefore, that the rules established in cases

determining quotas for the movement of wheat or coal would not be equitable if applied to western Oregon lumber. It is argued also that the consideration of damages suffered by Wren during the summer months of 1950 should not be limited to lumber on hand, nor to shipments made in prior years, as a basis for capacity, for the reason that prior operations and shipments are only as accurate a measure of Wren's capacity as the defendant's furnishing of cars in any period was equitable and complete. There being no period of equitable or complete car service for Wren, rules for distribution stated in prior reports of this Commission, it is urged, should not be considered as controlling here.

Rating for mills in the so-called agents' 50 reports gave Wren 4 cars on a stated production of 135,000 feet. This production figure is said to have been furnished the defendant by one of the partners of Wren. The rating later was raised to 5 cars, but the record is indefinite as to why such an increase was made. Wren claims that it was at the time producing more lumber; that it was and is shown in reliable publications relating to the Oregon lumber industry as having a capacity of 140,000 feet for its resaw mill and 200,000 feet for the planing mill; and that the proper official of the defendant was advised of this capac- [546] ity, which would warrant a quota or rating of 7 cars a day, but that the carrier-official could not remember having received such advice from Wren. Notwithstanding that reliable information was published by the defendant's freight traffic manager and in Crow's Buyers and Sellers Guides, such publications were not consulted nor used in making ratings for Wren or other mills on the Toledo branch of the defendant. At no time during the period covered by this report was Wren given a rating of more than 5 cars.

Reference is made to *Martin Bros. Box Co. v. Southern Pac. Co.*, 280 I. C. C. 395,[2] wherein division 3 dismissed a complaint against the defendant here which sought damages from losses of profit and goodwill due to alleged failure during the first 9 months of 1947, at the plant of the complainant at Oakland, Oreg., safe and adequate car service which it was claimed subjected the complainant to undue or unreasonable prejudice and disadvantage. Complainant argued that the instant record is more complete than that in the foregoing proceeding.

Wren asks an award of damages in the amount of $154,385.86. This total is made up of (1) loss of profits, $144,510.45, claimed as profits which could have been obtained from mill and planer operations if cars had been available for capacity operation and shipment, and (2) loss on sales of cants, $9,875.41. The computations appear to be based on capacity operation; that is, a production of 4,000,000 feet per month, or 16,000,000 feet for the reparation period, June to September 1950, both inclusive, which the witness for Wren termed "normal production," or the production in July and August 1948.

On June 1, 1950, Wren had on hand 285,358 feet of sawmill lumber and 77,919 feet of cants; on July 1, 543,733 and 182,766 feet, respectively; on August 1, 685,800 and 145,756 feet; on September 1, 1,165,768 and 480,798 feet; and on September 30, 1,408,033 and 560,784 feet. A witness for Wren presented at the hearing copies of a substantial number of car orders bearing dates in June, July, August, and September of 1950. Generally, they sought delivery or placement of 6 cars a day. On some there were notations indicat-

[2]Now on appeal from a final judgment of the District Court for the District of Oregon (Martin Bros. Box Co. v. United States, decided May 15, 1953), setting aside the order dismissing the complaint.

ing that 5 cars had been furnished on an order for 6; on some, the order-form notations indicated that 7 cars were furnished on an order for 6; on others there were no notations to indicate whether any cars had been furnished on a particular car order. The record indicates that there may have been other car orders on which Wren received cars during the period, but which the witness failed to bring to the hearing. The witness stated that Wren actually received 173 cars (of which 7 were stop- [547] overs) during the period June to September 1950, and that of 343 cars ordered during the period, Wren used 47 cars in October and 26 cars in November 1950.

Computations in support of Wren's claim for reparation were presented by a certified public accountant employed by Wren; they were reviewed by another certified public accountant employed by the defendant. From the latter's examination of Wren's records, it appears that of 350 cars ordered for spotting by Wren during the period June to September 1950, 197 cars were furnished. However, orders for 165 cars placed during the period were canceled. In the last 10 months of 1950, Wren ordered 557 cars, canceled orders for 245, and received 394, or 82 more than asked for on uncanceled orders. From this, the defendant argues that Wren was given a reasonable flow of empty cars for all the months during which it operated in 1950.

One of the partners, a principal witness for Wren, testified that the car-supply situation in 1951 for Wren was "very good." In that year, Wren ordered for daily placement from 1 car to 4 cars. During the months of June to September, inclusive, Wren ordered as many as 4 cars on each of 5 days; for the remainder of the period the daily orders were for 2 or 3 cars. From this and the large cancellation of car orders made in September and October 1950, the defend-

ant argues that orders of 6 cars per day during the summer period of 1950 were inflated and excessive. The number of feet of lumber shipped by Wren, by months for 1950 and 1951 are shown as follows:

MONTH	1951	1950	MONTH	1951	1950
January	666,586	0	July	1,503,143	1,722,566
February	83,119	0	August	1,448,938	1,573,728
March	110,038	1,001,061	September	1,141,352	1,626,028
April	60,482	1,207,061	October	1,551,318	1,723,706
May	490,896	1,429,970	November	462,685	816,694
June	1,293,778	2,269,640	December	473,900	608,145
			Total	9,286,241	13,978,599

Wren's profits exceeded $118,500 for 1948, $105,500 for 1949, and approximated $94,500 for 1950. The stated production capacity of 16 million feet of lumber and cants, used as the basis for the reparation sought, assumes that Wren would have operated at full capacity during the 103 working days in June through September 1950, with small or no margin for normal work stoppages due to injuries to employees, equipment breakdown, or other hindrance. The estimates for the 4-month period also assume that the prevailing prices for lumber would have remained in effect if Wren and all the other western Oregon mills had enjoyed a 100-percent car supply during the period.

Wren was entitled to just, reasonable, and nondiscriminatory car [548] service. However, there is no absolute right of cars for any shipper, and the carrier is liable in damages only if it fails to render a just and reasonable service. In *Midland Valley R. Co. v. Barkley*, 276 U.S. 482, 484-485, the Supreme Court said:

> The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in

full. The law exacts only what is reasonable from such carriers.

There were car shortages severe in nature on the Portland division of defendant's lines during the summer seasons of 1946 to 1950, inclusive. From the showing made of record, there is no ground for the assumption that Wren or any other of the 436 mills on the Portland division reasonably might have expected sufficient cars for maximum lumber-capacity production and, in addition, for lumber purchases during the summer months of 1950.

On the issue of discrimination, it is clear that Wren did not receive as many cars in the summer of 1950 as he desired, but neither did other mills on the Portland division. Wren was diligent in his efforts to obtain cars; so were other shippers in the territory, and some of them expended greater efforts to obtain cars than did Wren. There is some evidence that Wren did not receive cars in as close a ratio to capacity production as did other mills on the division during the time. This, the complainant asserts, was due to the method used in allotting cars to the mills on a quota, or rated, basis. A rating was assigned to Wren based on information furnished by it, as was done generally in the case of other mills, and these ratings were revised from time to time. In one such revision the rating for Wren was increased from 4 to 5 cars a day. Wren claims the rating should have been changed to 7 cars a day, and it is claimed that the proper official of the defendant was furnished information which warranted that rating. The official testified that he had no recollection of having received any such information. The official is criticized for not having used information furnished by the traffic manager of the defendant and also official publications relating to the lumber industry in Oregon in assigning ratings. It appears, however, that the same method was followed in assigning quotas

or ratings for all mills on the Portland division, and apparently the results were unsatisfactory to all shippers who testified of record. The evidence falls short of establishing that Wren fared any worse, as a whole, under the quota system used than did the other shippers on the Portland division.

A careful study of the evidence bearing on the issue of damages to Wren is convincing also that it lacks sufficient definiteness to support an award of reparation. There is no convincing proof, if Wren had [549] obtained all of the cars ordered, that it could have made any particular number of additional shipments, nor, if additional shipments had been made, what specific profits thereon could have been expected. In cases of this character, where special damages are sought, the proof thereof must be as definite and certain as would be necessary to support a judgment in court. *American Trading Corp. v. Seaboard Air Line Ry. Co.*, 201 I. C. C. 440,443; *Lignum-Vitae Products Corp. v. Alabama G. S. R. Co.*, 268 I. C. C. 599, 608. The evidence before us fails to meet this test.

With respect to the alleged inadequacy of facilities and service, the defendant emphasizes that the number of carloads originated and terminated by it in Oregon was greater by 47,000 in 1951 than in 1950. Of these, 15,635 cars consisted of lumber and forest products. The increase in the volume of lumber and forest products carried was 619,400 tons. As to the operation of freight trains, there were 1,672 westbound in the period April to October 1950 between Eugene and Crescent Lake as compared with 1,747 in the same period in 1951. In recent years the defendant has substantially increased its fleet of diesel locomotives and switchers, completed new retarder yards at Roseville and Los Angeles, Calif., increased its traffic density and freight-

train speed, installed centralized traffic control on several portions of its lines in California, and planned such control on the lines between Crescent Lake and Klamath Falls. Also, at the time of the hearing the defendant had well under way a study of its several subdivisions of lines in Oregon, with a view to the installation of centralized traffic control thereon, including the Portland division, the Springfield subdivision, and the Shasta division. Installation of such control between Eugene and Crescent Lake was in progress at the time of the oral argument herein. By the end of 1954 it is expected that it will be completed between Eugene and Klamath Falls, a distance of 195 miles.

There are not enough cars made empty in Oregon nor in California, north of San Francisco, to satisfy demands for empty cars for loading in those areas. It is thus necessary for the defendant to move empty cars from the area around Los Angeles and from as far distant as Texas and Louisiana. A number of cars are received from the defendant's connections at Ogden, Utah. The necessity of bringing empties from such distant areas and over routes with such difficult operating conditions as that via Tehachapi, Calif., increases the hazards likely to restrict or stop the flow of cars to the Oregon territory.

The lack of facilities and the operation on the Siskiyou line between Ashland, Oreg., and Hornbrook, Calif., was criticized by witness for the Oregon commissioner. Prior to 1926 the Siskiyou line was the defendant's only entrance into Oregon. In June 1926 it carried 32½ [550] trains per day. Inauguration of service over the Cascade line through Klamath Falls diverted traffic from the Siskiyou line so that in 1952 the average movement over the latter was 8.2 trains per day. The capacity of that line is the same now as in 1926. It now handles about 30 percent of the empty cars brought

into Oregon. In 1926, locomotives operated over that line into Oregon had a rating of 645 tons; the locomotives now used to serve Oregon are for the most part diesels with a rating of 2,450 tons. With the Cascade line in service, western Oregon is now given about 11 times more train service than in 1926. Carloads originating on the defendant's lines in Oregon have increased 170 percent, and tons originated have increased 200 percent, 1951 over 1926. More than $630,000,000, was spent by the defendant in the last 20 years for additions and betterments to its property and for locomotives and cars, of which about $375,000,000 was expended in the last 6 years.

The defendant asserts that the car shortages which occurred during the summer of 1947 to 1950, inclusive, were the only severe peacetime shortages on its lines since 1923. Large surpluses of empty cars occurred in the period 1924 to late 1940. For example, in 1939 the defendant had on its lines an average daily surplus of 6,632 serviceable cars, and in 1940 the average was 5,374. That period was followed by an upsurge in traffic volume as a result of World War II, during which the defendant had difficulty in disposing of cars made empty on its lines. With the end of the war, the situation suddenly changed and there was a car shortage until a decline in industrial production and in railroad traffic occurred in 1949. Shortly thereafter there followed an upsurge in traffic caused by the Korean conflict, so that the national traffic situation changed from a reported car surplus of some 35,000 to one of car shortages that became widespread and severe in many parts of the country, particularly in western Oregon. Moreover, the effect of the 5-day week, in terms of car shortage was to reduce the Nation's car supply by about 175,000 cars. These car shortages, national in scope, were discussed in the 64th and 65th annual reports

of this Commission to the Congress, and included the period covered by the complaint herein.

As a contributing factor to the defendant's difficulty in furnishing cars to its shippers during this period, the Association of American Railroads issued several car service orders or directives requiring the defendant to turn over to its connecting lines specified numbers of serviceable cars as described in the orders. Seven such orders were issued in 1946, 4 in 1948, 3 in 1949, 10 in 1950, and 7 in 1951. Four of these were still in effect in December 1950. Illustrative of the orders made effective during 1950 was one requiring the defendant to deliver to the Atchison, Topeka and Santa Fe Railway Com- **[551]** pany, called the Santa Fe, 500 plain boxcars suitable for merchandise loading at the rate of 50 cars daily. This order took effect on May 21, 1950, and was canceled on June 10, 1950. On June 1 it was modified so as to exclude Santa Fe plain boxcars from all distribution and loading, except in the State of Oregon, and requiring the return of such cars empty to their owners. Another order, effective on July 7, 1950, and canceled on August 3, 1950, required the defendant to withdraw from distribution and return to owners all boxcars owned by The Western Pacific Railroad Company then located in California and Nevada. This order was superseded by another, effective July 10, which directed the defendant to deliver 50 empty serviceable plain boxcars daily to the Western Pacific for a 10-day period. Effective on July 16, 1950, another order required the defendant to deliver to the Union Pacific Railroad Company at southern California junctions, 50 serviceable plain boxcars daily, not including Canadian boxcars or cars routed home to owners at junctions where made empty. The order was amended on August 2 so as to increase the requirements to 125 cars daily, and again amended on August

17 to increase the demands to 200 cars daily. These orders aggravated the car-supply situation for the defendant at a time when it could not supply its own shipper demand.

During World War II the purchase of cars, locomotives, and many other materials were restricted by priorities. In the period 1940 to 1951 the defendant purchased 48,813 freight cars and 725 locomotives. Some 454 of the latter were diesels. Since 1946 the defendant has purchased some 30,680 cars, at a cost of approximately $380,000,000, and contributed some $79,000,000 for the purchase of refrigerator cars for the Pacific Fruit Express, in which the defendant has a half interest. Delays were experienced in the delivery of some of the equipment. Bad-order cars have been repaired with diligence. The defendant insists that it has done all within its power to serve its shippers.

Reference is made to an agreement reached by the railroads in July 1951 at Chicago, Ill., the principal points of which were to increase car ownership to 1,727,873 cars as of July 1, 1950, an increase of 122,000 cars; reduce bad-order cars to 5 percent of the ownership of each class of car on the road; speed up car handling so as to attain an average of 50 miles per freight car per day; avoid delays and other insufficiencies in freight car handling; and solicit shipper-receiver cooperation in freight-car efficiency.

The defendant, in recent years, has had on order numbers of cars much above the average for class I railroads. In carrying out the Chicago agreement, it has far exceeded the efficiency in operation there contemplated. In 1950, the defendant was moving freight cars more than 65 miles per day, and for all serviceable cars, 68 miles. [552] Unserviceable cars on all class I railroads were about twice the percentage of that on the system lines of the defendant. For the period 1946 to 1951, the defendant exceeded the national average in additions to equipment.

General discussion and conclusions.—The production of lumber in western Oregon has been increasing steadily for a number of years, and in recent years the increase has been accelerated. This is an important factor in the car-supply situation complained of. While the defendant has not furnished all the cars desired by Oregon lumber shippers during the peak season in summer months, on an annual basis the cars furnished have approximated, and in some instances exceeded, those ordered by the shippers. While it may be that the defendant should have anticipated additional equipment needs earlier than it did, it may not be overlooked that no one could foretell with certainty the increased traffic demands made after World War II nor the handicaps experienced with governmental priorities in obtaining delivery on orders for new equipment. As stated, the car shortages in the periods complained of were largely national in scope, and there is no convincing evidence that, on the whole, the complainant's members did not fare as well in the car service accorded them as did shippers generally in car-shortage areas elsewhere. In these circumstances, the record would not support a finding that the defendant is guilty of unreasonable laxity in meeting the great and largely unexpected demands made upon it in the periods referred to.

With respect to the present facilities and service of the defendant, the additional cars and diesels purchased, the improved facilities, and the increased operating efficiency in recent years, together with improved car distribution which should result from compliance with the order of the Oregon commissioner, effective June 27, 1953, may reasonably be expected to insure adequate car supply and service, and equitable car distribution, to the complainant's members in the future. However, should inequitable car distribution

develop on any of the defendant's divisions, application should be made promptly to the Commission for relief, when consideration will be given to the issuance of a car service order requiring the defendant to distribute the available cars in an equitable manner.

We conclude that the record fails to establish that the defendant failed to provide transportation upon reasonable request therefor, or failed to furnish adequate car service within the limits of its capacity, or subjected any of the complainant's members to undue or unreasonable prejudice or disadvantage, as alleged. The complaint will be dismissed.

[553]